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NO. COA11-81
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 05 CRS 83485, 87

LONZELL GREGORY SMITH

Appeal by Defendant from judgment entered 4 June 2010 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 25 May 2011.

Attorney General Roy A. Cooper by Assistant Attorney General Stanley G. Abrams, for the State.

Glenn Gerding, for Defenant.

BEASLEY, Judge.

Lonzell Gregory Smith (Defendant) appeals pursuant to N.C. Gen. Stat. §15A-979(b) from the trial court's order denying his motion to suppress any evidence obtained as a result of the traffic stop that preceded his arrest. We affirm.

On 17 October 2005, Defendant was indicted on one count of trafficking by possession over four hundred grams of cocaine and

one count of trafficking by transporting over four hundred grams of cocaine. On 22 January 2007, Defendant's motion to suppress was heard in Guilford County Superior Court. The trial court denied Defendant's motion to suppress and at trial, the jury deadlocked and the trial court declared a mistrial. On 21 December 2009, the State reinstated the charges. On 1 June 2010, Defendant pled guilty to one count of trafficking by possession over 200 grams of cocaine and one count of trafficking by transporting over 200 grams of cocaine, reserving his right to appeal the denial of his motion to suppress.

On the afternoon of 2 July 2005, North Carolina Highway Patrol Officer Timmy Cardwell observed a Honda Odyssey minivan traveling northbound on Interstate 85 at a high rate of speed. Trooper Cardwell (Cardwell) estimated that the minivan was traveling between 71 and 75 miles per hour which exceeded the 65 mile per hour speed limit. As the minivan passed him, Cardwell observed the vehicle slow down to about 60 miles per hour and noted that the two occupants did not look at him when they passed him. Cardwell then pursued the minivan. Again, neither occupant looked at him when he sped up to pursue the vehicle. Cardwell drove up beside the minivan and observed that all occupants were wearing seat belts. Also, he noticed that both

occupants again did not look at him.

At or about 3:45 p.m. Cardwell activated his blue lights and conducted a traffic stop of the minivan. He asked the driver, Richard McDonald, for his license and registration, and the driver produced a Maryland driver's license. The passenger, Defendant, passed Cardwell the van's registration. Cardwell noticed that both the driver and Defendant were breathing heavily and the driver did not make eye contact with Cardwell. Cardwell asked Defendant if he was the owner of the van and Defendant replied, "no." After reviewing the registration, Cardwell learned that the van was registered in Maryland to Vincent Mento. Cardwell asked the driver to step out of the van. The driver complied and Cardwell directed him to the area between the rear of the van and the front of the patrol car. Cardwell then asked the driver, who continued to breathe heavily, if he owned the minivan and the driver said, "no." Cardwell asked the driver to raise his shirt in order to make sure he did not have any weapons. The driver complied. After Cardwell noticed nothing suspicious, he directed the driver to get into the passenger seat of the patrol car.

Once they were in the patrol car, Cardwell informed the driver that he had been pulled over for speeding. The driver

remarked that he was not aware that he had been speeding. Next, Cardwell asked the driver about the owner of the van. The driver stated that the van belonged to his friend Vincent Mento and he borrowed the minivan to go to Florida. Upon further questioning, the driver stated that he borrowed the minivan to take his children to West Palm Beach, Florida, to stay with an aunt. Again, the driver did not make eye contact while talking to Cardwell and continued breathing rapidly. The driver first stated that Defendant followed him to West Palm Beach, and then he stated that the Defendant rode with him in the van. Because of his suspicions, Cardwell contacted Trooper William Allison for assistance.

Cardwell ran the driver's information through his computer while they were in the patrol car. While Cardwell waited for the results of the inquiry, he continued to ask the driver questions. The driver stated that they were traveling back to Maryland from Florida. Cardwell thought that this route was suspicious because Interstate 95 would have been a more direct route and asked the driver why he had taken this route. The driver said that he stopped to visit his sister in Atlanta. Cardwell then left the patrol car to speak with Defendant.

Cardwell asked Defendant who owned the van and Defendant

responded that the driver's cousin, Vincent Mento, owned the van. Cardwell also asked him about their travels, but Defendant was unable to tell Cardwell where they had been. Cardwell testified,

[Defendant] couldn't tell me where they had been. Four or five separate occasions he could not tell me where they had been. He just said he had ridden with him south and they had visited some city but didn't know where they had been, didn't know for what reason. He was just riding. And he also advised when I tried to pinpoint down exactly, he still was unable to tell me. The best he could tell me was they had been there some - in some city for about a day and saw signs that said it was somewhere south of North Carolina but he still didn't know. And he further stated, I asked him as I tried to pinpoint some cities, only thing I could get was he said that he saw a sign that said Atlanta but he didn't know where they had been.

Cardwell also testified that Defendant was hesitant when responding to him and became increasingly nervous the more they talked. After four or five minutes of conversation with Defendant, Cardwell returned to the patrol car.

When Cardwell returned to the patrol car, he informed the driver that he was going to issue him a warning citation for speeding. While Cardwell wrote the citation, he again asked the driver about the ownership of the vehicle and their travels. Cardwell told the driver that he was concerned because neither

occupant owned the vehicle and they gave inconsistent accounts about where they had been traveling. The driver stated that he did auto work and then later said that he did auto parts work. The driver initially stated that he was taking his children to West Palm Beach, then said he was only taking his five-year-old daughter. The driver stated that he left Maryland on Thursday and then said he left on Friday.

After Cardwell completed the warning ticket, he returned the driver's license and the registration. Cardwell then asked the driver if he was transporting anything illegal in the van and the driver said "no." Cardwell then asked the driver if he could search the vehicle and driver responded "yes, go ahead." Once Cardwell presented the driver with the consent to search form, the driver read it, refused to sign it, but verbally gave consent to search. After Cardwell signed the consent form indicating that the driver would not sign, but gave verbal consent, he again called Trooper Allison to assist him in conducting the search.

Troopers Allison and Hall arrived at the scene within about ten minutes of the driver giving consent to search. Trooper Allison then led his canine to the van. The dog alerted troopers to the presence of narcotics. Cardwell searched the

vehicle by hand and discovered over 400 grams of cocaine in the spare tire well.

The sole issue on appeal is whether the trial court erred in denying the Defendant's motion to suppress. Defendant argues that Trooper Cardwell's detention of him after completing the purpose of the traffic stop amounted to an illegal detention. We disagree.

"The scope of review of the denial of a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Robinson*, 187 N.C. App. 795, 797, 653 S.E.2d 889, 891 (2007) (quoting *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001)).

In general, "[t]he scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1981)). Our Courts have explained that "[o]nce the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360

(1998). This Court requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)) "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

Defendant concedes that the initial stop was lawful, thus we do not address the constitutionality of the traffic stop. Rather, Defendant argues that the detention after the issuance of the citation was not supported by reasonable suspicion and therefore violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Section 20 of Article I of the North Carolina Constitution. Defendant compares our Court's decision in *Falana* and *State v. Myles*, 188 N.C. App. 42, 654 S.E.2d 752 (2008) to support his contention. We disagree.

As to the constitutionality of the detention, in *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), the Supreme Court, after establishing that the initial stop of the defendant's vehicle was proper, proceeded to "address the question of whether the further detention of defendant from the time the warning ticket was issued until the time the canine unit arrived went beyond the scope of the stop and was unreasonable." *Id.* at 636, 517 S.E.2d at 132. The Court concluded that "several factors . . . gave rise to reasonable suspicion under the totality of the circumstances" justifying an extended detention:

First, when asked who owned the car, defendant said his girlfriend, but would not give Trooper Lisenby her name. It was only after defendant had been asked several times that he said his girlfriend "Anna" owned the car. When Trooper Lisenby inquired "Anna?" defendant said "I think so." However, "Anna" was not the name listed on the title as the owner of the car. Second, although defendant seemed unsure of who owned the car, the address of the owner listed on the title and the address on defendant's driver's license were the same, which would seem to indicate that they both lived in the same residence. Third, defendant was extremely nervous, sweating, breathing rapidly, sighing heavily, and chuckling nervously in response to questions. He also refused to make eye contact when answering questions.

Id. at 637, 517 S.E.2d at 133. The Court "conclude[d] that these facts, when viewed in the totality of the circumstances, allowed the officers to form a reasonable suspicion that criminal activity was afoot." *Id.*

The defendant in *McClendon* had argued that nervousness was not relevant under *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998). In rejecting this argument, the Court reasoned: "Nervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. *Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists.*" *McClendon*, 350 N.C. at 638, 517 S.E.2d at 134 (emphasis added). The Court pointed out that while the nervousness in *Pearson* "was not remarkable, the defendant in *McClendon* "exhibited more than ordinary nervousness; defendant was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer." *Id.* at 639, 517 S.E.2d at 134.

In *Falana*, a trooper observed a car weaving and suspected the driver of being impaired. He detained the vehicle and noticed that the driver was breathing rapidly and hesitated when

answering the trooper's question. The trooper also found it suspicious that the passenger did not know whether they left New Jersey on Saturday or Sunday. Our court held that these factors alone did not give rise to reasonable suspicion that criminal activity was afoot.

In this case, the trial court's findings of fact support reasonable suspicion to extend the traffic stop based on the following findings of fact:

That Sergeant Cardwell observed both occupants to be extremely nervous and observed the driver's hands trembling and observed both occupants to appear to be uncomfortable.

Upon inspecting the operator's driver's license and the vehicle registration, Sergeant Cardwell observed that the operator was not the owner of the van. And further observed that the operator's eye contact was poor, his breathing was rapid[.]

That Mr. McDonald's level of nervousness aroused Trooper Cardwell's suspicion.

That based upon Sergeant Cardwell's training and experience in the field of narcotics interdiction third party vehicles are often used for transportation of drugs as well as money laundering.

During Sergeant Cardwell's conversation in the vehicle with Mr. McDonald he observed that Mr. McDonald did not make good eye contact and continued to breathe rapidly suggesting an extreme case of nervousness. Mr. McDonald also told Trooper Cardwell that

the defendant had followed Mr. McDonald to West Palm Beach to deliver his kids to family members and then changed his story and said that the defendant had, in fact, ridden with the defendant and his children in the same van.

Sergeant Cardwell became somewhat suspicious as the most direct route from the West Palm Beach area of Florida to Maryland is by way of Interstate 95[.]

That Sergeant Cardwell observed a high degree of nervousness on the part of the defendant.

[T]hat Mr. McDonald asked the defendant if he'd like to ride with him and that since he was doing nothing he decided he would ride with his friend but could not tell Trooper Cardwell where he had been except they had been riding south and did not know where they had been or for what purpose but they had been in some city for one day south of North Carolina. And that he had observed an Atlanta sign but didn't know where they had been, that he had been asleep.

That Sergeant Cardwell observed the defendant to be unsure of himself and that his nervousness increased the more the -- the more there was an exchange of conversation between Sergeant Cardwell and the defendant.

Unlike *Falana*, Cardwell relied on several factors such as the nervousness of both Defendant and driver, the third party ownership of the vehicle, the suspicious route of travel, and the inconsistencies in both the driver and Defendant's stories, most notably, Defendant's inability to specifically state the

purpose of their trip and from where they had just traveled. Therefore, we conclude that the extended detention was supported by reasonable articulable suspicion.

Myles is also distinguishable. In *Myles*, this Court determined that the officer did not have reasonable suspicion to support an extended detention of a motorist and his passenger. The officer detained the vehicle because he observed the vehicle weaving and suspected that the driver was impaired. When the officer stopped the vehicle, the officer did not smell alcohol and observed no signs of the driver being impaired. After asking the driver for his license and registration, the officer learned that the vehicle was a rental. The officer then asked for the passenger's license because the rental agreement was in his name. After the license check, the officer issued the driver a warning ticket, but then asked the driver to step out of the car while he wrote the ticket. Then, the officer spoke to both passenger and driver separately. He noticed that both were extremely nervous and they gave different dates concerning when the rental car was to be returned. Our Court held that the detention was not supported by reasonable suspicion where the officer testified that he did not believe that the driver was impaired, the driver's license check revealed no outstanding

violations, and he found nothing suspicious about the overdue rental car. The only factor supporting reasonable suspicion that criminal activity was afoot was the nervousness of the driver and the defendant. In *Myles*, this Court concluded that nervousness of a defendant cannot be the sole factor supporting reasonable suspicion. "Although our Supreme Court previously has stated nervousness can be a factor in determining whether reasonable suspicion exists, our Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances." *Myles*, 188 N.C. App. at 50, 654 S.E.2d at 757-58.

In the case *sub judice*, Cardwell's reasonable suspicion was supported by more than Defendant's nervousness. Trooper Cardwell also relied on other factors, including the excessive speed of the vehicle, the inconsistent stories concerning the reason for travel, the indirect travel route, and the third party ownership of the van. The inconsistencies in *Myles* were slight, but the inconsistencies in the case *sub judice* were considerable where Defendant, although a passenger in the van, could not state where he was traveling or his reason for traveling.

Based on the foregoing, we hold that the detention of Defendant was supported by reasonable articulable suspicion and was therefore lawful. Defendant's motion to suppress was properly denied.

Affirmed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).